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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE APPLE & AT&TM ANTITRUST LITIGATION	Master File No. C 07-5152 JW
	REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFF KLIEGERMAN'S CROSS-MOTION FOR APPOINTMENT OF INTERIM LEAD CLASS COUNSEL
	DATE: April 7, 2008 TIME: 9:00 a.m. CRTRM: 8 JUDGE: Hon. James Ware

I. INTRODUCTION

Plaintiff Herbert H. Kliegerman respectfully submits this reply memorandum in further support of his cross-motion to appoint Wolf Haldenstein Adler Freeman & Herz LLP ("Wolf Haldenstein" or "the Firm") interim lead class counsel in these consolidated actions. Plaintiff files this reply to correct factual inaccuracies and other misstatements made by Messrs. Fernandez and Folkenflik in their firms' papers opposing his cross-motion.[1]

II. ARGUMENT

A. The *Kliegerman* Action is not a "Copycat" Lawsuit

Co-plaintiffs' counsel are in error when they suggest that Wolf Haldenstein has spent "limited" time investigating this case (Folkenflik Decl. Opp. at ¶12) and has brought a "copycat" lawsuit that does not "bring anything new to the case" (Fernandez Mem. Opp. at 2, ¶5). Even a cursory comparison of the three operative complaints in these consolidated actions reveals their extensive dissimilarities, both as to substance and style. *Compare* Folkenflik Decl. Opp., Exhs. C, E and G.

For example, Mr. Fernandez's complaint (*Id.,* Exh. C at ¶¶117-206) contains 14 causes of action, including two California Cartwright Act antitrust claims and two federal Sherman Act claims, but also including claims based on alleged violations of the California Penal Code, the federal civil RICO statute and several California warranty, consumer protection and unfair competition statutes. Mr. Folkenflik's complaint (*Id.*, Exh. G at ¶¶76-105) contains six causes of action, including California and federal antitrust claims, a California consumer protection statute claim similar to claims filed by Mr. Fernandez, as well as claims for Trespass to Chattels and for an Accounting that are not included among Mr. Fernandez's claims. The complaint drafted by Wolf Haldenstein on behalf of plaintiff Kliegerman (*Id.*, Exh. E at ¶¶97-144), asserts eight causes of action. Unlike the complaints drafted by Messrs. Fernandez and Folkenflik, which assert only California-based consumer protection claims, the complaint drafted by Wolf Haldenstein asserts

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[1] On March 17, 2008, Mr. Fernandez's firm filed a Memorandum of Law in Opposition to the Motions for Appointment of Interim Lead Counsel Filed by Counsel for Kliegerman and Holman ("Fernandez Mem. Opp."), and Mr. Folkenflik's firm filed a Memorandum of Law in Opposition to the Motion to Disqualify Counsel and Motions to Appoint Fernandez or Wolf Haldenstein as Interim Lead Counsel ("Folkenflik Mem. Opp.") and a supporting Declaration ("Folkenflik Decl. Opp.").

consumer protection claims on behalf of aggrieved iPhone customers in 43 jurisdictions, in addition to California, in which the consumer protection statutes at the time of filing authorized private class actions as an available remedy.

The most notable substantive differences between the complaint drafted by Wolf Haldenstein and those prepared by Messrs. Fernandez and Folkenflik pertain to the nature of the antitrust claims asserted, which of course lie at the crux of these cases. Mr. Folkenflik's complaint asserts four antitrust counts, which appear to conjoin six or more different types of antitrust claims. Initially, it asserts, in the First Count, what appears to be a tying claim merged with claims for "unlawful monopolistic activity" and "unreasonable restraint of trade." *Id.*, Exh. G at ¶¶79-80. Without providing any of the reasonably detailed market identification and market power allegations customary for tying or monopoly claims, Mr. Folkenflik's complaint states baldly that Apple has "monopoly power" in the "iPhone market" and that the "iPhone is a unique product" as to which there are no reasonable substitutes. Mr. Folkenflik's First Count then alleges that Apple has unlawfully tied the sale of iPhones to the sale of other products, such as Apple's ringtones and AT&TM's voice and data services, and that these practices and unlawful agreements create an "unreasonable restraint of trade" and "threaten to extend Apple's monopoly power" in the "iPhone market" into the tied product markets. *Id.* at ¶80.

In the Second Count, Mr. Folkenflik's complaint asserts that Apple and AT&TM combined to create "an unlawful trust" and entered into an agreement that "may ... substantially lessen competition and create a monopoly…." *Id.* at ¶88. The Third Count of Mr. Folkenflik's complaint, which is styled as being brought under Section 1 of the Sherman Act, 15 U.S.C. §1, does not specifically allege a tying claim, which is normally brought under Section 1, but instead asserts a claim for an "unreasonable restraint of trade" that "threaten[s] to extend Apple's monopoly power" in the "iPhone market" to the "GSM wireless voice services market, GSM wireless data services, ringtone market and other markets for mobile telephone applications." Folkenflik Decl. Opp.. at ¶91.

Finally, in the Fourth Count, Mr. Folkenflik's complaint asserts a claim, under Section 2 of the Sherman Act, 15 U.S.C., §2, for "specific intent to monopolize" a "relevant market" and "to

control prices or destroy competition" in the "United States wireless voice services market, the United States wireless data services [market], the market for ringtones generally or specifically for ringtones sold for use with the iPhone and other markets for mobile telephone applications generally and markets for such applications ... for use with the iPhone...." *Id.* at ¶95. Mr. Folkenflik's Section 2 count does not assert claims for attempted monopolization or conspiracy to monopolize any market or submarket.

A common theme underlying each of Mr. Folkenflik's antitrust claims is reliance on the iPhone itself as being an economically distinct product market. While other difficulties with Mr. Folkenflik's pleading potentially abound,[2] his tactical choice to rely entirely on a single product market definition is questionable given that a single product market is one of the most difficult market constructs to prove in antitrust law. Since he admits that he has not yet retained a reputable antitrust economist against whom to test his market definition theory, Mr. Folkenflik cannot responsibly feel sanguine about whether he has pled sustainable antitrust claims. Indeed, the fact that Mr. Folkenflik failed to utilize an expert in drafting his complaint is itself indicative of his lack of expertise in antitrust law. Drafting an antitrust complaint with an expert is common practice and serves to effectively test the economic viability of antitrust theories and to obtain assurance that the claims are sustainable. Just as in a complicated medical malpractice case a physician is consulted, and in a complicated product defect case an engineer is consulted; here too, consultation with an expert ensures that complex antitrust claims are well-pled. Only Wolf Haldenstein has investigated these claims properly by consulting with an economist to test the economic viability of its theories.

Mr. Fernandez's complaint asserts two California and two federal antitrust claims. The two state claims assert a "*per se*" tying claim under two different Cartwright Act provisions, sections 16720 and 16727. Folkenflik Decl. Opp., Exh. C at ¶¶117-127. Mr. Fernandez's Third

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[2] While perhaps consistent with his lack of antitrust experience, Mr. Folkenflik's imprecise mixing of antitrust concepts and theories makes for cumbersome reading, to say the least. With all due respect for his accomplishments in other areas of the law, Mr. Folkenflik simply has not demonstrated sufficient familiarity and facility with antitrust law to be appointed lead counsel entrusted to represent the potentially millions of class members in this antitrust litigation.

Cause of Action is a Sherman Act Section 1 tying claim nearly identical to his two state claims. Folkenflik Decl. Opp., Exh. C at ¶¶128-131. Despite recent United States Supreme Court authority that has curtailed application of the *per se* label to tying claims, Mr. Fernandez has not expressly pled an alternative tying claim under the rule of reason. As such, Mr. Ferenandez's *per se* tying claim is inconsistent with recent Supreme Court precedent curtailing use of the *per se* label for tying claims. *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 35-37 (2006). This is also demonstrative of Mr. Fernandez's lack of experience and expertise in antitrust law.

Mr. Fernandez's Fourth Cause of Action is mis-labeled as a Sherman Act Section 2 "Monopolization" claim, 15 U.S.C. §2, but it merely reasserts the tying claim combined with the concept of "unlawful trusts," stating that "Apple and AT&T[M] have engaged in a *per se* tying arrangement and unlawful trusts for their Antitrust Conduct and harm discussed above[.]" Folkenflik Decl. Opp., Exh. C at ¶133. Mr. Fernandez's Section 2 claim does not facially plead the elements of a monopolization claim, an attempted monopolization claim or a conspiracy to monopolize claim. *See id.* at ¶¶132-135.[3]

Mr. Fernandez's market definition appears at some places in the complaint to differ materially from Mr. Folkenflik's, but at other places it appears to be the same. Initially, Mr. Fernandez asserts that the relevant product market, as against Apple, is the "SIM Card-Smartphone Market," of which Mr. Fernandez asserts discovery will show Apple controls 30%. *Id.* at ¶62. Later, however, Mr. Fernandez asserts a single product market theory by alleging that "Apple has sufficient economic power in the tying market (the iPhone) to coerce the purchase of the tied product (AT&T's cell phone service and iTunes Media) because it has a 100% market share of the iPhone." *Id.* at ¶72. Mr. Fernandez then later reverts to a "SIM-Smartphones" market definition, the geographic scope of which he alleges is "worldwide." *Id.* at ¶¶106, 108.

As against AT&TM, Mr. Fernandez appears to assert that the relevant product market is

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[3] Though the extent of his factual research of the underlying events is commendable, Mr. Fernandez's muddling of antitrust concepts and claims, similar to Mr. Folkenflik's, reflects that he likewise lacks sufficient grounding in antitrust law and analysis to adequately lead these cases.

the "Cell Phone Market," which he describes as including voice and data services, email, internet accessing and Multimedia Messaging Service for transmitting photos and videos. *Id.* at ¶63. Mr. Fernandez asserts that AT&TM has 27.1% of the "United States" Cell Phone Market. *Id.* The relevance of that allegation is unclear given his alleged worldwide geographic market.

Mr. Fernandez's "SIM-Smartphone" and "Cell Phone" markets may be more economically viable than Mr. Folkenflik's single product market, but few modern antitrust cases have held that market shares of 30% or less are sufficient to prove market power in Section 1 tying cases or to prove monopoly power under Section 2. *See e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26-27 (1984). While the Defendants' low market shares may not be fatal to Mr. Fernandez's antitrust claims, especially if he can prove actual anticompetitive impact from the Defendants' conduct in the form of higher prices, reduced output or otherwise, Mr. Fernandez, like Mr. Folkenflik, has not obtained an expert economist on whose analysis he can base any degree of confidence that his antitrust claims will be sustained. Again, as with Mr. Folkenflik, Mr. Fernandez's failure to do so demonstrates a lack of expertise and experience in antitrust law that may prove critical in prevailing against these defendants - two large corporations with vast resources and lawyers well-equipped with antitrust experience to defend this case.

B. The *Kliegerman* Complaint Brings Substantially Different and Sustainable Antitrust Claims

The antitrust theories and claims in the Kliegerman complaint drafted by Wolf Haldenstein differ substantially from those drafted by Messrs. Folkenflik and Fernandez. Wolf Haldenstein has not asserted any tying or other Section 1 claims. Nor has Wolf Haldenstein asserted any Section 2 claims that require plaintiffs to meet the difficult burden of proving that the iPhone is an economically viable single product market or that Apple has substantial market power in a "SIM-Smartphone" (or similar) market. Instead, in each of its Counts I through V, Wolf Haldenstein has asserted a specific type of Section 2 claim – known as a "*Kodak*" claim – in which the extent of market competition faced by the iPhone itself is legally irrelevant, and the only pertinent economic inquiry is whether the ***aftermarket*** for products that can be used only in connection with an iPhone – like iPhone compatible voice and data services, ringtones, email and

multimedia applications – is economically distinct. *See* Folkenflik Decl. Opp., Exh. E at ¶¶97-127; *Eastman Kodak Co. v. Image Tech. Servs., Inc.,* 504 U.S. 451, 481-82 (1992).

Unlike Messrs. Folkenflik and Fernandez, Wolf Haldenstein took the prudent and reasonable step of obtaining the opinion of a leading antitrust economist with considerable communications industry experience to test the economic viability of its antitrust theories and to obtain assurance that its plaintiff's antitrust claims are sustainable. Accordingly, Wolf Haldenstein knows that its antitrust theories are imminently provable in this case.

In sum, while the factual context underlying each of the three related consolidated actions is the same, there is no truth to Mr. Fernandez's contention that Wolf Haldenstein has merely identified "factual and legal issues ... copied from other counsel" and has not demonstrated "vision, initiative, and originality of ideas." Fernandez Mem. Opp., at 2, ¶¶3, 5. As shown above, the truth is quite the opposite. Wolf Haldenstein and its co-counsel have spent over 320 hours on this matter, including analyzing the merits of the various potential antitrust claims in this action and preparing the Kliegerman complaint. *See* Reply Affidavit of Alexander H. Schmidt in Further Support of Plaintiff Kliegerman's Cross-Motion for Appointment of Interim Lead Class Counsel, ¶2, filed herewith. In addition, Wolf Haldenstein's economics firm spent 40 more hours assessing the relevant market and economic issues. *Id.* Far from being a "copycat," Wolf Haldenstein has brought, and as interim lead counsel will continue to bring, to these consolidated cases what Messrs. Fernandez and Folkenflik cannot bring: the antitrust and class action expertise necessary to prevail in this lawsuit against large and well-represented adversaries.

Of the three firms seeking lead counsel appointment, only Wolf Haldenstein has the antitrust expertise to responsibly separate the wheat from the chaff of competing antitrust theories when preparing a consolidated amended complaint; only Wolf Haldenstein has the resources and muscle to compete aggressively against these Defendants through trial if necessary; only Wolf Haldenstein has the substantive knowledge to accurately and fairly evaluate the Plaintiff classes' claims for settlement purposes; and only Wolf Haldenstein has investigated the antitrust claims properly, with the aid of an economist. The lead counsel position should not be granted to a one or two-person firm that has no demonstrated antitrust acumen or experience.

C. AT&TM's Intent to Seek Arbitration Against Kliegerman is Irrelevant

Mr. Folkenflik is off base in arguing that Wolf Haldenstein should not be named lead counsel because AT&TM will move to arbitrate Kliegerman's claims against AT&TM. These are competing motions under Rule 23(g) to be appointed interim lead class counsel in an antitrust case. They are not motions for appointment of a lead plaintiff, which is not provided for in Rule 23(g). Fed. R. Civ. P. 23(g). Thus, any possible defenses AT&TM may assert to plaintiff Kliegerman's claims are irrelevant. Even if AT&TM does move to arbitrate Kliegerman's claims and even if it prevails, and even if plaintiff Kliegerman's claims against Apple are stayed – which is unlikely – Wolf Haldenstein still can and should be appointed lead counsel for the Classes in this case because it is overwhelmingly the firm best suited to carry out the duties of that position.

III. CONCLUSION

Accordingly, for these and all the reasons previously stated, plaintiff Kliegerman respectfully submits that appointment of Wolf Haldenstein as interim lead class counsel is appropriate.

DATED: March 24, 2008

Respectfully Submitted,
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